Supreme Court, U.S.
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In the

Supreme Court of the United States

THE STATE OF ILLINOIS,

Petitioner,

vs.

GREGORY FISHER,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED FOR REVIEW

Whether a defendant's pre-existing discovery request to examine evidence renders the government's motive irrelevant when assessing whether the defendant's due process rights were infringed by the destruction of evidence.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully asks this Court to issue a writ of *certiorari* to the Appellate Court of Illinois, First District, to review that court's judgment and order entered on January 21, 2003.

OPINION BELOW

The Appellate Court of Illinois, First District issued its decision in this case on January 21, 2003. *People v. Fisher*, No. 1-00-1997. This decision is unreported but is reprinted in the Appendix to this petition. The June 4, 2003 order of the Illinois Supreme Court, denying Illinois' Petition for Leave to Appeal, is also reprinted in the Appendix to this petition. *People v. Fisher*, 2003 Ill. LEXIS 1133 (No. 95721 June 4, 2003).

STATEMENT OF JURISDICTION

The Appellate Court of Illinois, First District entered its judgment on January 21, 2003, and the Illinois Supreme Court denied Illinois' Petition for Leave to Appeal on June 4, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a), since the Appellate Court reversed respondent's conviction based upon a violation of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Respondent, Gregory Fisher, a resident of Tennessee was arrested on September 6, 1988 following a traffic stop in Chicago, Illinois and was charged with possession of a controlled substance with intent to deliver on October 18, 1988. (R. I23-25, I83; C. 10)

On October 26, 1988, defense counsel filed a motion for discovery, including a request to make available all physical evidence the prosecution intended to use at trial. (C. 21-26) The State responded by informing the defense that all physical evidence will be made available for inspection at a reasonable time and date upon request. (C. 27) The Chicago Police Crime Lab performed three different preliminary screening tests on the white powder recovered from respondent, indicating the presence of cocaine. (R. I110-11) Further testing by the Illinois State Police Crime Lab confirmed the presence of cocaine. (R. I131-43)

On July 18, 1989, respondent (who was free on bond) failed to appear in court and a bond forfeiture warrant was issued. (R. I151-52) Judgment was entered on the warrant on August 17, 1989. (R. I152) The warrant was not executed until November 4, 1999 after respondent had been arrested in Chicago on an unrelated matter. (R. I153-54, I171-72) However, on September 17,1999, the drugs which had been recovered from respondent were destroyed by the Chicago Police Department's Evidence and Recovered Property Section pursuant to a long-standing and generally applicable policy. (R. I159-70)

After respondent learned that the drugs had been destroyed, he made a formal request to produce the evidence. (C. 42-43) Once that was formally rejected, respondent moved to dismiss the charges based upon the destruction of the evidence. (C. 57-58) The trial court denied the motion and the parties proceeded to trial where a jury found him guilty of possession of a controlled substance (more than one but less than 15 grams of cocaine). (R. D13-21, I257) The trial court sentenced respondent to one year in the Illinois Department of Corrections. (R. J34)

On January 21, 2003, the Illinois Appellate Court, First District, reversed the conviction, finding that respondent's due process rights were violated when he was tried after the evidence was destroyed on September 17, 1999. (See Appendix at 16) The court explained that respondent's original discovery request on October 26, 1988 placed the prosecution on notice that the evidence should have been preserved. (See Appendix at 16) The court further held that even though there was no indication of bad faith, respondent was unduly prejudiced by the destruction since "his only hope for exoneration was to demonstrate that the evidence was not, in fact, cocaine." (See Appendix at 15).

Petitioner, the State of Illinois, filed a timely petition for leave to appeal to the Illinois Supreme Court. That petition was denied on June 4, 2003. (See Appendix at 17) Petitioner now seeks a writ of certiorari to review the judgment and order of the Appellate Court of Illinois, First District.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS APPELLATE COURT'S HOLDING THAT RESPONDENT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN INCULPATORY EVIDENCE WAS DESTROYED IN THE ORDINARY COURSE OF BUSINESS AFTER RESPONDENT FAILED TO APPEAR AND WAS A FUGITIVE FROM JUSTICE FOR MORE THAN 10 YEARS MERELY BECAUSE HE MADE A GENERAL DISCOVERY REQUEST PRIOR TO ABSCONDING CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

Although it was undisputed that the evidence seized by the Chicago police was destroyed as part of a routine process during the more than 10 year period that respondent was a fugitive from justice, the Illinois Appellate Court held that his due process rights under the Fourteenth Amendment were violated by that destruction and that he should not have had to stand trial on the charges of possession of a controlled substance simply because a discovery request made prior to respondent violating his bond placed the State on notice that the evidence should have been preserved. As this holding is in direct conflict with both this Court's decisions addressing destruction of evidence claims as well as those of many other states, Petitioner respectfully requests that this Court grant *certiorari* and reverse the decision of the Illinois Appellate Court.

In *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988), and *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984), this Court established the framework for addressing claims regarding "what might loosely be called the area of constitutionally guaranteed access to evidence." *Trombetta*, 467 U.S. at 485, 104 S.Ct. at 2532.

In *Trombetta*, the Court held that any duty of the prosecution to preserve evidence under the due process clause of the Fourteenth Amendment "must be limited to evidence that might be expected to play a significant role in the suspect's defense." *Id.* at 488, 104 S.Ct. at 2534. Moreover, the Court explained that "[t]o meet this standard of constitutional materiality, evidence must possess both an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. at 2534 (internal citation omitted).

In *Youngblood*, the Court further refined this rule for claims involving evidence where its exculpatory value was not readily apparent by holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58, 109 S.Ct. at 337 The *Youngblood* Court explained:

> "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."

Id. at 57, 109 S.Ct. at 337.[1] The *Youngblood* Court further

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[1] Just as in Youngblood, the record in the instant case demonstrates unequivocally that no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) or *United States v. Agurs*, 427 U.S.

(continued...)

noted that "requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i. e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.* at 58, 109 S.Ct. at 337.

Although some state courts have relied upon their own state constitutions to provide broader "due process" protections than those recognized in *Youngblood* and *Trombetta* (see, e.g., *State v. Ferguson*, 2 S.W.2d 912 (Tenn. 1999); *State v. Morales*, 232 Conn. 707, 657 A.2d 585 (1995); *State v. Delisle*, 162 Vt. 293, 648 A.2d 632 (1994); *State v. Steffes*, 500 N.W.2d 608 (N.D. 1993); *Lolly v. State*, 611 A.2d 956 (Del. 1992); *State v. Riggs*, 114 N.M. 358, 838 P.2d 975 (1992); *Commonwealth v. Henderson*, 411 Mass. 309, 582 N.E.2d 496 (1991); *State v. Matafeo*, 71 Haw. 183, 787 P.2d 671 (1990); *State v. Smagula*, 133 N.H. 600, 578 A.2d 1215 (1990); *Thorne v. Department of Public Safety*, 774 P.2d 1326 (Alaska 1989); *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989)), most state supreme courts have faithfully applied *Youngblood* and *Trombetta* and recognized that no due process violation occurs in the absence of bad faith on the part of the police. See, e.g., *Cox v. State*, 849 So.2d 1257 (Miss. 2003); *King v. State*, 808 So.2d 1237 (Fla. 2002); *Brannon v. State*, 275 Ga. 70, 561 S.E.2d 414 (2002); *Williams v. State*, 50 P.3d 1116 (Nev. 2002); *Albrecht v. State*, 737 N.E.2d 719 (Ind. 2000); *State v. Lamae*, 268 Kan. 544, 998 P.2d 106 (2000); *State v. Ste. Marie*, 770 So.2d 315 (La. 2000); *State v. Ferguson*, 20 S.W.2d 485 (Mo. 2000);

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[1] (...continued)
97, 96 S.Ct. 2392 (1976) occurred in this case. (C. 27) See *Youngblood*, 488 U.S. at 56, 109 S.Ct. at 336.

Kirk v. Commonwealth, 6 S.W.2d 823 (1999); *State v. Vanover*, 721 A.2d 430 (R.I. 1998); *Lee v. State*, 327 Ark. 692, 942 S.W.2d 231 (1997); *State v. Burke*, 73 Ohio St. 3d 399, 653 N.E.2d 242 (1995); *State v. Singleton*, 319 S.C. 312, 460 S.E.2d 573 (1995); *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994); *Hogan v. State*, 877 P.2d 1157 (Okla. Crim. App. 1994); *State v. Dulaney*, 493 N.W.2d 787 (1992); *State v. Marshall*, 123 N.J. 1, 586 A.2d 85 (1991); *People v. Wyman*, 788 P.2d 1278 (Colo. 1990); *State v. Berkley*, 567 A.2d 915 (Me. 1989); *State v. Tanner*, 233 Neb. 893, 448 N.W.2d 586 (1989).

By contrast, in *People v. Newberry*, 166 Ill. 2d 310, 652 N.E.2d 288 (1995), the Illinois Supreme Court held that a defendant's due process rights are infringed independent of any bad faith on the part of the police whenever evidence is destroyed if the defendant made a discovery request for that evidence before the destruction took place. *Id.* at 317, 652 N.E.2d at 292. Moreover, *Newberry* determined that once a defendant has made such a timely request, he need not establish that the missing evidence had any exculpatory value in order to obtain relief. *Id.*

In *Newberry*, the defendant was charged with possession of a look-alike substance with intent to distribute after the police seized a substance they believed to be cocaine but the preliminary field test came up negative. However, after a subsequent laboratory test reached a contrary result, the defendant was re-indicted for possession of a controlled substance with intent to deliver and the look-alike charges were dismissed by the prosecution. Defense counsel then filed a motion for discovery, including a request to examine all tangible objects recovered from the defendant. Approximately one year later, the prosecution informed the defense that the cocaine had been mistakenly destroyed by the technician after the look-alike charges had been dismissed. Defense counsel then moved to dismiss indictment based

upon the destruction of the evidence. The trial court granted the motion and ultimately, the Illinois Supreme Court affirmed that ruling. In rejecting the State's arguments based upon *Youngblood* and *Trombetta*, the Illinois Supreme Court explained:

> "[T]here is a fundamental distinction between this case and those decisions cited by the State requiring a showing that the police acted in bad faith. Here, unlike *Youngblood* and *Trombetta*, the police destroyed the disputed substance after defense counsel had requested access to it in his discovery motion. *Where evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation.* If the State proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent. *No showing of bad faith is necessary*."

Id. at 317, 652 N.E.2d at 292 (emphasis added) (internal citation omitted)

As a result of *Newberry*, Illinois courts are the only courts in the nation which hold that due process-destruction of evidence claims under the Fourteenth Amendment are dependent upon whether the defendant made a discovery request prior to the destruction of evidence. Thus, it is clear that the due process clause of the Fourteenth Amendment applies differently in Illinois than it does elsewhere in the nation. However, as this Court stated in *Arkansas v. Sullivan*, 532 U.S. 769, 121 S.Ct. 1876 (2001) (per curiam):

> "[W]hile 'a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon

> federal constitutional standards,' it 'may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.'"

Id. at 772, 121 S.Ct. at 1878 (quoting *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219 (1975)) (emphasis in *Hass*).

Furthermore, at least one court has recognized that the *Newberry* rule is inconsistent with this Court's pronouncements. In *Henry v. Page*, 223 F.3d 477 (7th Cir. 2000), the defendant asserted he was entitled to a writ of *habeas corpus* because the State destroyed the substances seized from his car but nonetheless introduced evidence that those substances were cannabis and cocaine. The defendant maintained that under *Newberry*, his due process rights were infringed because the state's action "prevented him from independently analyzing the substances and possibly rebutting the state's evidence that those substances were, in fact, cannabis and cocaine." *Id.* at 480. The Seventh Circuit rejected that claim, noting that the *Newberry* rule could not be enforced by a federal court in a *habeas corpus* action but nevertheless held that under *Youngblood* and *Trombetta*, the Illinois courts properly rejected his federal constitutional claim since the defendant could not establish that the destruction was undertaken in bad faith or that the substances possessed an exculpatory value that was apparent before they were destroyed. *Id.* at 481-82.

In the instant case, the Illinois Appellate Court blindly followed *Newberry*'s construction of the due process clause and wholly ignored the clear constitutional framework set out in *Youngblood* and *Trombetta*. Although the Illinois Appellate Court specifically noted that "there is nothing in the record to indicate that the alleged cocaine was destroyed in bad faith" (see appendix at 15), it nevertheless explained that since respondent's original discovery request

on October 26, 1988 placed the State on notice that the evidence should have been preserved, he therefore did not have to demonstrate bad faith to establish a due process violation. (See Appendix at 12-14). Moreover, the court further found that respondent was necessarily prejudiced because "his only hope for exoneration was to demonstrate that the substance was not, in fact, cocaine." (See Appendix at 15).

In finding a due process violation based upon the destruction of the evidence, the appellate court elevated the existence of a discovery request to paramount importance while neglecting the totality of circumstances nature of a fundamental fairness inquiry. "Rules of due process are not, however, subject to mechanical application in unfamiliar territory." *County of Sacramento v. Lewis*, 523 U.S. 833, 850, 118 S. Ct. 1708, 1718 (1998). Rather, it is long-established that "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it [a court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290 (1941). As the Court explained in *County of Sacramento*:

> "'The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.'"

County of Sacramento, 523 U.S. at 850, 118 S.Ct. at 1719 (quoting *Betts v. Brady*, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256 (1942)).

Moreover, the appellate court's exclusive focus upon the existence of a discovery request is particularly egregious in the instant case because it wholly ignores the fact that respondent was a fugitive for well over 10 years after he made that initial discovery request and that it was this exceptionally long delay that resulted in the routine destruction of the evidence. It has been long recognized the due process clause permits courts to deprive the use and benefit of the court's resources to those defendants who have improperly excused themselves from the court's authority. See e.g. *Degen v. United States*, 517 U.S. 820, 824-25, 116 S.Ct. 1777, 1781 (1996) (discussing the fugitive disentitlement doctrine); *Ortega-Rodriguez v. Untied States*, 507 U.S. 234, 245-46, 113 S.Ct. 1199, 1206-07 (1993) (same); *Estelle v. Dorrough*, 420 U.S. 534, 537, 95 S.Ct. 1173, 1176 (1975) (same); *Molinaro v. New Jersey*, 396 U.S. 365, 365-66, 90 S.Ct. 498, 498-99 (1970) (same); *Allen v. Georgia*, 166 U.S. 138, 140-41, 17 S.Ct. 525, 526-27 (1897) (same). As the Court explained in *Molinaro*, "escape disentitles the defendant to call upon the resources of the Court for determination of his claims." 396 U.S. at 366, 90 S.Ct. at 499. Similarly, disentitlement "discourages the felony of escape and encourages voluntary surrenders" while also "promot[ing] the efficient, dignified operation" of the courts. *Estelle*, 420 U.S. at 537, 95 S.Ct. at 1175.

In the instant case, by ignoring the 10 year period where respondent was a fugitive from justice and giving full and complete effect to the routine discovery request which was made long before he willfully violated his bond, the Illinois Appellate Court has effectively rewarded respondent for failing to comply with the law because the cocaine would never have been destroyed had respondent not absconded.

Moreover, the appellate court's conclusion that respondent was necessarily prejudiced by the routine destruction of the evidence since it was his only source of potentially exculpatory evidence is nothing more than bald conjecture, since at the time of the destruction all the tests had established that the evidence was in fact cocaine. Thus, there was no basis from which to conclude that the evidence was anything other than a controlled substance. Accordingly, it is clear that the appellate court's order suppressing the evidence is neither warranted by "due process of law" nor consistent with any notion of fundamental fairness.

Because Illinois' construction of the due process clause cannot be reconciled with this Court's rulings or those of the highest courts of many other states, the Constitution is currently being applied inconsistently across the nation. Accordingly, Petitioner respectfully requests that this Court grant *Certiorari*, explicate that the existence of a discovery request is irrelevant and reiterate that in the absence of bad faith, the destruction of potentially exculpatory evidence does not violate the due process clause of the Fourteenth Amendment.

CONCLUSION

For the aforementioned reasons, Petitioner, the State of Illinois, respectfully requests that this Honorable Court grant *certiorari* and reverse the decision of the Illinois Appellate Court. Because it is clear that the lower court ignored this Court's settled precedents, summary reversal may be appropriate under Rule 16.1.

Respectfully submitted,

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APPENDIX

Appendix A

FIRST DIVISION
January 21, 2003

1-00-1997

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
vs.	)	No. 88 CR 16323
GREGORY FISHER,	)	Honorable Lawrence P. Fox, Judge Presiding.
Defendant-Appellant.	)	

ORDER

Defendant, Gregory Fisher was charged by information with possession of a controlled substance with intent to deliver on October 18, 1988.[1] On October 26, 1988, defendant's attorney filed a motion for discovery, requesting the

[1] The State subsequently and with leave amended the information to the charge of possession of more than one but less than fifteen grams of cocaine.

State to make available for inspection before trial all physical property the State intends to use at the time of trial. The State's answer to discovery, filed November 18, 1988, stated that "all physical evidence herein will be made available for inspection at reasonable time and date upon request."

On July 18, 1989, defendant failed to appear in court, and on July 18, 1989, defendant failed to appear in court, and a bond forfeiture warrant was issued. On August 17, 1989, the trial court entered judgment on the bond forfeiture warrant. That warrant was executed over 10 years later, on November 4, 1999.

On September 17, 1999, the white powder allegedly seized from defendant was destroyed. On January 19, 2000, defendant's new counsel filed a motion to produce the suspect controlled substance, and later filed two motions to dismiss the information based on the State's destruction of the evidence. Argument was heard on both of the motions to dismiss, and both motions were denied.

The matter proceeded to a jury trial, at the close of which defendant was found guilty of possession of more than one but less than fifteen grams of cocaine, and was sentenced to one year in the Illinois Department of Corrections.

On appeal, defendant makes the following contentions: 1) the State's failure to preserve the evidence used against him denied him due process; 2) he received an unfair trial where foundation for the admission of scientific evidence was lacking; 3) he received an unfair trial where hearsay evidence was allowed to establish his failure to appear in court during a 10 year period, and to show how police inventoried the evidence used to convict him; 4) he received an unfair trial where the State presented irrelevant and prejudicial evidence with respect to the amount of narcotics seized from his co-defendants; 5) he received ineffective assistance of counsel where his attorney did not move to

strike testimony which impeached his credibility and failed to request a jury instruction with respect to the impeachment of one of the police officers, and 6) the State distorted the burden of proof during closing argument.

Factual Background

At trial, the State called as its first witness Officer Stanley Mullins. Officer Mullins testified that he has been a Chicago Police Officer for fifteen years. On September 6, 1988, Officer Mullins was working the evening shift in a three-man tactical unit on an assignment related to narcotics. His partners on that date were Officers Leonard Perry and Al Parks.[2] The officers were in plain clothes and driving an unmarked squad car.

At approximately 9:20 p.m., the officers were traveling southbound on Laramie, in Chicago, and approaching Lake St. As they neared the intersection of Laramie and Lake, Officer Mullins saw a brown two-door car fail to stop at a traffic light while traveling eastbound on Lake St. The officers activated their squad's emergency equipment, pursued the brown vehicle, and, pulling alongside of it, displayed their badges. The vehicle then pulled to the curb; the officers pulled up just behind it. All three officers exited their vehicle, and walked toward the brown car.

Officer Mullins was the first to arrive at the driver's side window of the brown car. The driver (subsequently identified as Kevin Price) of that car exited, at which point the car's dome light became illuminated. Officer Mullins asked to see Kevin Price's driver's license, and was shown instead an I.D. card. Officer Mullins looked inside the car to see whether the I.D. photo matched anyone

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[2] At the time of trial, Officer Parks was retired, and was evidently unreachable.

else in the car. As he looked inside the car, Officer Mullins saw the back seat passenger (subsequently identified as Darryl Price) stuffing a plastic bag into the crease; of the seat. Almost simultaneously, he saw the front seat passenger (defendant) putting a plastic bag "up beneath him."

Upon making these observations, Officer Mullins told his partners that there was movement in the car. At that point, the other two officers were taking tactical positions behind the car. Officer Mullins ordered the defendant and Darryl Price out of the car, and both exited from the passenger side, and were detained by Officers Parks and Perry. After defendant stepped out of the car, Officer Mullins saw, on the front passenger seat, a clear plastic bag, which he described as "kind of flattened out with four packets in it." In the packets, there appeared to be a white powdery substance.

At that point, Officer Mullins asked Kevin Price to step to the rear of the car, after which Kevin suddenly put his hand into his jacket pocket. Officer Mullins believed Price to have been searching for a weapon and was scared. He grabbed-Price's arm by the wrist, and pulled it out. At the same time, a bag fell from Price's person and hit the ground. It was a clear plastic bag, with a number of white packets in it.

Mullins bent down to retrieve the bag, at which point Price knocked him over and pushed him to the ground, after which Price fled on foot. Officer Mullins picked up the bag, and chased after Kevin Price. Price was apprehended, and brought back to the car. As Officer Mullins joined the other two officers, he learned from Officer Parks that two bags containing a white powdery substance had been recovered from the car; one from the back seat, and one from the front passenger seat. Defendant, Kevin and Darryl Price were all placed under arrest, and transported to the 15th District Police Headquarters.

Officer Mullins subsequently made an inventory slip for the narcotics, assisted by Officer Parks. He also completed both an arrest and a vice case report. Officer Mullins was shown inventory slip number 544187, and confirmed that it was the inventory slip relating to the defendant. The slip reflected that one plastic bag containing four plastic wraps which in turn contained a white powdery substance had been recovered.

On cross-examination, Officer Mullins acknowledged that at the preliminary hearing, he testified that defendant had been in the back seat of the car. He also acknowledged that, in his vice case report (which he stated was more detailed that the arrest report), he did not include that he had seen defendant stuffing a clear plastic bag underneath or behind him. Instead, the report stated only that he saw defendant sitting on something, and found a plastic bag on the seat where defendant had been sitting.

On redirect, Officer Mullins was shown other portions of the transcript from the preliminary hearing, and confirmed that he stated repeatedly that defendant was in the front passenger seat; he testified that his reference to defendant having been in the back seat was an isolated slip of the tongue. He also confirmed that he stated in both his arrest report and his vice case report that defendant had been a passenger in the front seat. Officer Mullins explained that an arrest report is more specific as to any individual arrestee, whereas a vice case report is an overall summary of the incident leading to the arrest(s). In his arrest report he wrote that defendant was observed stuffing an object underneath him.

Next to testify in the State's case was Officer Leonard Perry. Officer Perry testified that he has been a Chicago Police Officer for 20 years. On September 6, 1988, he was working in plain clothes, on a narcotics mission with Officers Stanley Mullins and Al Parks. His testimony was consistent with that of Officer Mullins with respect to the

events that led up to the curbing of the brown car at approximately 9:20 p.m.

Officer Perry saw Officer Mullins approach the driver, who had exited the vehicle. He (Officer Perry) and Officer Parks went to the rear of the car. Officer Perry saw Officer Mullins talk to the driver, and look into the vehicle. Officer Perry next saw Officer Mullins pick himself up off the ground, as Kevin Price fled eastbound on Lake St. Officer Mullins gave chase, and told his partners to watch the vehicle occupants because he had seen movement inside the vehicle. From where he was standing behind the car, Officer Perry did not see defendant stuff any object underneath him in the front seat.

Defendant and Darryl Price were ordered out of the vehicle, and Officer Parks searched its interior. Officer Perry observed Officer Parks pick up two items; one from the front passenger seat, and one from the rear passenger's seat. He saw that the items retrieved were two plastic bags; one with four small plastic wraps and the other with several plastic wraps. Each of the plastic wraps contained white powder, which Officer Perry suspected was cocaine.

Officer Mullins then returned with Kevin Price, and showed to his partners the package he had recovered from the ground, which Officer Perry observed was a clear plastic bag with several plastic packets in it, wrapped the same way as in the other bags recovered. All of the packets were inventoried in Officer Perry's presence, and each bag was separately sealed and assigned a separate inventory number.

Next to testify was Sheila Price Duggan, a former forensic chemist with the Chicago Police Department crime lab. The parties stipulated to her expert status. Ms. Duggan performed an analysis of the evidence recovered in defendant's case in October, 1988. She was shown the report she generated at the time, and confirmed that it stated she

received the evidence in a sealed marked envelope which bore the inventory number of 544187.

She removed the contents of the envelope, and made certain that they matched the description given in the inventory report. She then performed three different preliminary screening tests on the white powder, the results of which indicated the presence of cocaine. She returned the evidence to its original packaging, resealed the envelope and marked the opening she had made with her initials and the date. She then returned the envelope to the evidence vault.

Rene Poe Brown, a forensic chemist with the Drug Enforcement Agency, was next to testify. The parties stipulated to Ms. Brown's status as an expert in her field. Ms. Brown testified that she performed the analyses of the evidence submitted in the case of the co-defendants (tried separately), Kevin and Darryl Price. Ms. Brown concluded from those analyses that the evidence recovered from Kevin and Darryl Price was positive for the presence of cocaine. Defense counsel objected to this testimony, and moved to strike it in its entirety as irrelevant. The objection was overruled, and the motion to strike was denied.

Next came the testimony of Lawrence Wilson, a supervisor and chemist in the Illinois State Police in the drug chemistry section. The parties stipulated to his expert credentials in forensic chemistry. Mr. Wilson performed the confirmatory analyses on the evidence recovered in defendant's case.[3]

Mr. Wilson received the evidence inventoried under number 544187 in a sealed brown envelope. He briefly

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[3] Mr. Wilson performed the confirmatory analyses in the case of Darryl Price as well, and led through his conclusion related to that evidence.

described his testing procedures, which he stated were commonly accepted in the scientific community for detecting the presence of cocaine. According to the results of testing he performed, the evidence recovered in defendant's case was positive for the presence of cocaine.

Richard Casey, a supervisor in the office of the Clerk of the Circuit Court of Cook County, was next to testify. Mr. Casey stated that the Clerk's office is the keeper of the record of everything that happens in court. Those records are maintained both in paper form, and in a computer system. Mr. Casey testified that, having worked in the Clerk's office for 22 years, he was familiar with the common court entries and terminology. Mr. Casey was shown a computer generated statement of disposition from the Clerk's office, pertaining to defendant's case. He testified that the records indicate that there was a bond forfeiture warrant entered and continued in that case on July 5, 1989. He explained that a bond forfeiture warrant is entered by a judge when a person fails to appear in court.

The next court date in defendant's case was July 18, 1989, at which time the judge entered an order that a bond forfeiture warrant was to issue. After that, Mr. Casey explained, defendant had thirty days to appear before the court and explain his earlier absence. On August 17, defendant failed to appear, and the judge entered an order of SOL, along with judgment on the bond forfeiture.

Over defense counsel's objection, Mr. Casey testified that the warrant issued in defendant's case in 1989 was executed on November 4, 1999, according to the records before him. On cross-examination, Mr. Casey conceded that he had no independent knowledge of defendant having missed a court date.

Next to testify was Paul Motel, an employee of the Evidence and Recovered Property ("ERPS") section of the Chicago Police Department. Mr. Motel testified that ERPS

maintains property that has been seized by the Chicago police. He also testified that, in defendant's case, the evidence was destroyed after nearly 11 years, on September 17, 1999. He stated that all evidence is destroyed after a period of time, and that the evidence in defendant's case was not singled out for destruction.

Finally, Officer David Snethen testified that he has been a Chicago Police Officer for 23 years. On July 22, 1999, Officer Snethen was assigned to the area around Roosevelt and Sacramento, in Chicago. At approximately 11:00 a.m. that day, Officer Snethen was on duty, and arrested defendant on a matter completely unrelated to the instant case.

With that, the State rested, and defense counsel presented a three-part motion for a directed verdict. Part one was based on the State's asserted failure to meet its burden of proof. Part two was based on the destruction of the evidence, and part three was based on the fact that the defense was not allowed to cross-examine regarding or otherwise reveal the dispositions of the cases against the co-defendants. The trial court denied the motion as to all three bases.

The first and only witness to testify in defendant's case in chief was the defendant himself. Defendant testified that he is 38 years old, and lives in Missouri City, Texas. In 1988, he was living in Memphis, Tennessee, where he was employed as the manager at a Wal-Mart. On September 6, 1988, he was in Chicago for a family reunion. On that date, at approximately 9:30 p.m., he was riding in a car with his cousins, Kevin and Darryl Price. The men were on their way to fill a prescription for defendant's asthma medication. Defendant was positioned in the front passenger seat.

Defendant testified that while the car was at a stop sign, the detectives pulled up alongside it, and spoke to Kevin. Defendant denied that he ever saw flashing lights or

heard a siren, and denied that the car in which he was a passenger ever ran a red light.

The officers told the men to pullover across the street, which they did, and Kevin exited the vehicle. Officer Mullins approached Kevin, and began to strike him on the hand with a black baton. Officer Mullins told Kevin to open his hand, but Kevin broke away and ran. Defendant denied that Officer Mullins was knocked down, or that he was ever down. Defendant never saw any controlled substances in the vehicle, and denied having stuffed anything into the car seat, or sitting on top of any type of plastic packaging.

Defendant was subsequently placed under arrest, and taken to the police station in a paddy wagon. He never saw any of the officers search the vehicle, nor did he remember Officer Mullins returning with Kevin Price.

Defendant first spoke to Officer Mullins in the lockup, when Mullins asked him if he saw the drugs. Defendant answered that he had not, to which Officer Mullins replied "*you* will."

Defendant stopped coming to court in 1989 because he ran out of money to make the trip, and his car had been "repoed."

On cross-examination, defendant denied that he had told Officer Snethen that his address was a P.O. box in Missouri, or that the telephone number he gave to Officer Snethen was disconnected. He further denied that he told Officer Snethen that he was a truck driver, or unemployed.

In rebuttal, the State called Officer Mullins once again. Officer Mullins denied that he ever struck Kevin Price, and stated that he does not carry a baton when he is in plain clothes. Officer Mullins further denied that he told defendant that he would see drugs, or that he had ever had a conversation with defendant at all.

Finally, the State sought to recall Officer Snethen, but the record reveals that he was not in the hallway at that time. The State requested time to page him back to court, but the trial judge refused, and ordered that closing argument proceed.

The jury returned a verdict of guilty, after which defense counsel made a motion for a new trial. The motion was based on "prosecutorial misconduct," specifically that the State's closing argument was improper, and that the State should not have been allowed to make repeated reference to the co-defendants, where the disposition of those cases was concealed from the jury. The motion was considered and denied by the trial court.

This timely appeal followed.

Defendant contends that his right to due process was denied when the State destroyed the controlled substance at issue prior to trial. Our review of this issue, as to which there is no factual dispute and the question raised is purely one of law, is *de novo*. *People v. Daniels,* 187 Ill. 2d 301, 307 (1999).

Defendant relies primarily on the holding in *People v. Newberry*, 166 Ill. 2d 310 (1995) in support of his position. In *Newberry* the defendant was charged with the possession of a controlled substance. A field test on the substance seized by police indicated that it was not cocaine, and the defendant was subsequently charged with the possession of a look alike substance. Later testing revealed that the substance was in fact cocaine, prompting the State to nol pros the look alike substance charge, and to bring one for possession of a controlled substance. Following the institution of the controlled substance charge, the defense counsel made a discovery request that the substance itself be made available for inspection and independent testing.

One year later, the State served a supplemental discovery response informing defense counsel that the substance had been inadvertently destroyed.[4]

The defendant moved to dismiss the indictment against or, alternatively, to preclude the admission of evidence with respect to laboratory tests on the substance. The trial court granted the motion to dismiss, and the appellate court affirmed.

Our Supreme Court also affirmed, stating:

> "Where evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation. [Citation.] If the State proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent. No showing of bad faith is necessary." *Newberry*, 166 Ill. 2d at 317.

The Court noted that the sole basis for bringing criminal charges against the defendant was the chemical content of the substance seized by the police. When that substance was discarded, the Court reasoned, it became impossible for the defendant to "meet or dispute the test results by evidence of equal integrity or persuasiveness. *Id.* at 317.

Similarly, in *People v. Coleman*, 307 Ill. App. 3d 930 (1999), the Second District concluded that the trial court

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[4] It seems that one of the police department evidence technicians had checked the computer relative to this evidence, and, noting that the possession of a look alike substance charge had been nol prossed, destroyed the evidence. The technician was unaware that the evidence formed the basis for new charges.

erred when it denied the defendant's motion to dismiss the indictment against him on a controlled substance charge where the state lost or destroyed the substance itself prior to trial. The defendant in *Coleman* failed to appear for his initial court appearance, and remained on warrant status for the next four years, with no formal charges having been instituted. When the defendant was arrested in 1998, the State filed an indictment against him charging him with unlawful possession of a controlled substance. Shortly thereafter, the defense counsel filed a discovery request that the substance be made available for inspection, but subsequently learned of its destruction.[5]

Discussing the holding in *Newberry* the court in *Coleman* stated that the timing of the request for production in relation to the destruction of evidence is of critical importance. In particular, the evidence must be destroyed *subsequent* to a defendant's discovery request in order to trigger due process concerns. This is because it is only where evidence is requested by the defense in a discovery motion that the State is on notice that the evidence must be preserved. *Coleman,* 307 Ill. App. 3d at 936. See also *Newberry,* 166 Ill. 2d at 317 (distinguishing *Arizona v. Youngblood,* 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988) and *California v. Trombetta,* 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984) in which timely requests to produce had been made).

The State argues that the facts of the instant case are more analogous to those in *People v. Johnson,* 293 Ill. App. 3d 915 (1998) than they are to those in *Newberry* or *Coleman.* In *Johnson,* the defendant was charged in 1991 with possession of heroin. That charge remained pending by

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[5] Under Supreme Court Rule 411, the defendant was obliged to wait until an indictment was handed down to file his discovery motion.

agreement of the parties for four years, while the defendant responded to charges in an unrelated criminal trial which resulted in his acquittal.

At a status hearing on June 30, 1995, the State informed both the trial court and defense counsel that the heroin had been destroyed. On July 27, 1995, defense counsel filed a written request for the production of the evidence. The trial court found that the request was not timely, in that the case had been pending (*i.e.*, formal charges had been instituted) for more than four years when the request was finally made. The appellate court affirmed, distinguishing *Newberry* in which the request had been promptly made, and holding that testimony concerning the seized substance was admissible upon remand, unless the defendant could show that acts in bad faith caused the destruction of the evidence. *Johnson,* 293 Ill. App. 3d 915.

We find that the facts of the instant case are in certain respects similar to those *Newberry*, *Coleman* and *Johnson*. As in *Newberry*, a timely discovery request was filed herein. As in *Coleman*, defendant then absented himself from the jurisdiction for several years. And as in *Johnson,* a request for production of the substance at issue was made after it was discovered that the substance had been destroyed.

Our task is therefore to determine whether the law set forth in *Newberry* warranted dismissal in defendant's case. We are mindful as we do so that a defendant should not be rewarded for the inadvertent loss of a piece of evidence where other evidence sufficient to support his conviction remains. *People v. Hobley*, 159 Ill. 2d 272, 307 (1994). The proper balance between the interests of the State and the defendant can be accomplished, we are instructed in *Hobley* through careful consideration of (l) the degree of negligence or bad faith by the State in losing the evidence, and (2) the importance of the lost evidence relative to the evidence presented against the defendant at trial. *Id*. at 307.

Here, there is nothing in the record to indicate that the alleged cocaine was destroyed in bad faith. As was explained by Mr. Motel at trial, ERPS eventually destroys all of the evidence it recovers, in order to make room for the storage of new evidence. Further, defendant does not argue on appeal, nor did he at trial, that bad faith played a role in the destruction in this case.

We turn next to the importance of the lost evidence relative to the evidence presented against the defendant at trial.

Officers Mullins and Perry both testified that plastic bags containing white powder were recovered from the car in which defendant was a passenger. Officer Mullins also testified that one of those plastic bags was recovered from the seat upon which defendant had been sitting, and, though Officer Perry could neither confirm or deny it, that defendant was observed stuffing that same bag underneath him.

Because defendant had been seen with the substance in question, his only hope for exoneration was to demonstrate that the substance was not, in fact, cocaine. The Court in *Newberry* compared this scenario with the one presented in *Youngblood*, where the DNA evidence in question was not essential for establishing the defendant's guilt or innocence, and indeed played no role in the prosecution's case. 166 Ill. 2d at 315. See also *People v. Barksdale*, 327 Ill. App. 3d 422, 440 (2001) (finding no due process violation in the State's failure to preserve evidence that was not the basis upon which the defendant was being prosecuted).

Here, as in *Newberry* and any other case in which the charge is the possession of a controlled substance, "the sole basis for bringing criminal charges against [a defendant] is the chemical content of the substance seized by the police." 166 Ill. 2d at 316. Defendant could not have been convicted

independently of proof that the substance was cocaine. Compare *Barksdale*, 327 Ill. App.3d at 440 (where the disputed evidence was not used in the prosecution of the defendant). Because of this, the State's argument that defendant offered no evidence as to how independent testing of the evidence might have been exculpatory misses the point. *See People v. Crowder*, 323 Ill. App. 3d 710 (2001).

The substance in question was "essential to and determinative of the outcome of the case" (*Newberry*, 166 Ill. 2d at 315), and we therefore conclude that the trial in this matter should not have proceeded without it.

In sum, the defendant made a timely request for the production of the substance seized by police on October 26, 1988, and the State was thereby placed on notice that the evidence was to be preserved. Under *Newberry*, which we are required to follow (*People v. Hope*, 184 Ill. 2d 39, 44 (1998)), and progeny, we therefore hold that defendant was denied due process when he was tried subsequent to the destruction of the alleged cocaine.

We reverse the defendant's conviction, and the cause is remanded to the trial court for proceedings not inconsistent with this order. In light of our disposition, we do not review the remaining contentions raised by defendant in this appeal.

Reversed and remanded.

SMITH, J., with McNULTY and O'MALLEY, JJ., concurring.

Appendix B

People of the State of Illinois, petitioner, v. Gregory Fisher, respondent.

No. 95721

SUPREME COURT OF ILLINOIS

2003 Ill. LEXIS 1133

June 4, 2003, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Leave to appeal, Appellate Court, First District (1-00-1997).

OPINION: Petition for leave to appeal denied.

Opposition Brief Unavailable for Filming at This Time